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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1491

JAMES R. HOFFA, THOMAS EWING PARKS, EWING KING and LARRY CAMPBELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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INDEX

Page

Prayer 1

Opinions below 1

Jurisdiction 2

Questions presented 2

Statutes and constitutional provisions involved 3

Statement 4

Introduction 4

Eavesdrop hearing 7

A. Prehearing proceedings 7

B. Evidence relating to Partin-King conversation adduced at eavesdrop hearing 9

C. Trial Court's findings 13

D. Opinion of Court of Appeals 14

Reasons for granting the writ 15

1. Violation of Fifth and Sixth Amendments 15

2. Violation of Fourth Amendment 18

3. Government's suppression at trial of King-Partin transcript violated petitioners' right of due process and 18 U.S.C., Section 3500 21

Conclusion 24

Appendix A—Majority and dissenting opinions of the Sixth Circuit Court of Appeals A-1

Appendix B—Opinion of the District Court A-18

Appendix C—Judgments of the Court of Appeals ...A-42

Cases Cited

Brady v. Maryland, 373 U.S. 83 .....15, 23
Bumper v. North Carolina, 391 U.S. 543 20

Caldwell v. United States, D.C. Cir., 205 F. 2d 879 ... 17
Chapman v. California, 386 U.S. 18 18
Chimel v. California, 395 U.S. 752 19
Coplon v. United States, D.C. Cir., 191 F. 2d 749 17

Evans v. United States, 6 Cir., 284 F. 2d 393 18

Giles v. Maryland, 386 U.S. 66 .....15, 23

Harris v. New York, ... U. S. ..., No. 206, October Term, 1970 23
Hoffa v. United States, 385 U.S. 293 .....2, 15, 16

Judd v. United States, D.C. Cir., 190 F. 2d 649 20

Kinser v. Cooper, 6 Cir., 413 F. 2d 730 (1969) 20
Kovach v. United States, 6 Cir., 53 F. 2d 639 20

Massiah v. United States, 377 U.S. 201 .....2, 14, 15, 16, 17

Napue v. Illinois, 360 U.S. 264 (1959) 15

Osborn v. United States, 385 U.S. 323 19

Palermo v. United States, 360 U.S. 343 (1959) 22
People v. Stendig, 6 N.Y.S.2d 214 17
People v. Wallace, 234 N.Y.S.2d 579 17

Rosenberg v. United States, 360 U.S. 367 22

Shields v. United States, 273 U.S. 583 18
Silverman v. United States, 365 U.S. 505 20
Simmons v. Bomar, 6 Cir., 349 F. 2d 365 20

Spano v. New York, 360 U.S. 315 .....16, 17

United States v. Hoffa, et al., 6 Cir. 349 F. 2d 20, 385 U.S. 293 (1966) 5

United States v. Jeffers, 342 U.S. 48 19

United States v. Luxenberg, 6 Cir., 574 F. 2d 241 17

United States v. Rivera, 2 Cir., 321 F. 2d 704 19

United States v. Schor, 2 Cir., 418 F. 2d 26 18

United States v. Soffer, 7 Cir., 362 F. 2d 523 .....22, 23

United States v. Stanley, 6 Cir., 245 F. 2d 427 17

United States v. White, 7 Cir., 405 F. 2d 838, cert. gr. 394 U.S. 957 .....18, 19

Wong Sun v. United States, 371 U.S. 471 19

Wren v. United States, 10 Cir., 352 F. 2d 617 20

Statutes and Rules Cited

Constitution of the United States:

Fourth Amendment 2, 3, 7

Fifth Amendment 2, 3, 14, 15

Sixth Amendment 2, 4, 15

Federal Rules of Criminal Procedure, Rule 16 7

18 U.S.C., § 2 3

18 U.S.C., § 3500 .....3, 4, 15, 21, 22, 23

18 U.S.C., § 4208(a)(2) 6

28 U.S.C., § 1254(1) 2

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To the United States Court of Appeals for the Sixth Circuit

Petitioners pray that a Writ of Certiorari be issued to review the judgments of the United States Court of Appeals for the Sixth Circuit, entered in this cause on January 21, 1971.

OPINIONS BELOW

The majority and dissenting opinions of the Sixth Circuit Court of Appeals are not yet reported and are printed as Appendix A, *infra*. The opinion of the District Court is printed as Appendix B, *infra*.

JURISDICTION

The judgments of the Court of Appeals were entered on January 21, 1971 (Appendix C, *infra*). On February 16, 1971, Mr. Justice Stewart extended the time for filing the petition for writ of certiorari to March 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Were petitioners' Fourth, Fifth and Sixth Amendment rights violated when the government caused one of them, without prior judicial authority, to be surreptitiously interrogated by an informer in an automobile in which an electronic recording device had been placed; after such petitioner had been accused of the crime, had invoked the Fifth Amendment on several occasions, had obtained counsel, and the case had been fully presented to the grand jury which was to return an indictment against petitioners on the day following—thus placing him at the time of the interrogation in the position of a virtual defendant?

2. Whether this Court's holding in **Hoffa v. United States**, 385 U.S. 293, overrules **Massiah v. United States**, 377 U.S. 201, to such an extent that a defendant's Sixth Amendment right to be free of governmental interrogation in the absence of his counsel is not violated unless he has been formally indicted by a grand jury.

3. Where the conviction of one charged as a principal must be reversed, must the conviction of one charged as an aider and abettor of and jointly tried with such principal similarly be reversed?

4. Does a recorded statement, prepared by the government, of its secret informer and chief trial witness' interrogation of a defendant constitute a "statement" pro-

ducible under § 3500, Title 18, U.S.C., and may the government, without violating an accused's right to due process of law, intentionally and unilaterally withhold such a statement from the trial Court and from the defense?

5. Whether by reason of the government's intentional suppression of evidence vitally material to the constitutional validity of petitioners' convictions, this Court should in the exercise of its supervisory powers, as a deterrent to similar affronts to proper law enforcement, and to maintain the integrity and fairness of due administration of law, set aside the judgments of conviction heretofore rendered in this case.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 2, Title 18 U.S.C., provides in pertinent part:

> "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principle."

United States Constitution, Amendment IV provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment V provides in part:

> "* * * nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *"

United States Constitution, Amendment VI provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

Section 3500, Title 18, U.S.C., provides in pertinent part:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined), of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> * * * * * * *
>
> (e) The term 'statement' * * * means--(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

STATEMENT

Introduction

Petitioners were convicted in March 1964 on an indictment charging them with violating the Federal Obstruction of Justice Act by wilfully endeavoring to influ-

ence petit jurors in the discharge of their duties in a prior case involving petitioner Hoffa (sometimes referred to as the "Test Fleet" case). So far as relevant here, Hoffa and King were convicted on count 5, which charged that Hoffa aided in petitioner King's efforts in influencing a juror by the name of Mrs. Paschal. All convictions were affirmed by the Sixth Circuit Court of Appeals and by this Court. **United States v. Hoffa, et al.**, 6 Cir., 349 F. 2d 20; 385 U.S. 293 (1966). Petitioners were committed to the custody of the Attorney General and commenced serving their sentences on March 7, 1967. Petitioner Hoffa is presently incarcerated under said sentence and the remaining petitioners have completed their terms of imprisonment.

The evidence presented on count 5 may be summarized as follows:

Mrs. Paschal was a petit juror in the case involving Hoffa, i. e., the "Test Fleet" case. Oscar Pitts, a member of a Teamster Local in Nashville, of which petitioner King was President, testified that he spoke with King on October 27, 1962 (during the Test Fleet trial), regarding a possible promotion for Mrs. Paschal's husband, a Tennessee State Patrolman. By this time, however, agents of the F.B.I. were conducting a surveillance of King and saw him go to Pitts' house. On November 17, Pitts, State Patrolman Paschal and King met on the "River Road" and (according to Patrolman Paschal), King asked him whether he would talk to his wife. Although Paschal finally said that he would, he never did speak to his wife. Other than evidence corroborating the fact that the "River Road" meeting did take place (never denied by King), the only other evidence was testimony by secret informer Edward Grady Partin of inculpatory statements attributed to King and Hoffa. King categorically denied at trial all the statements attributed by Partin to him and denied that he asked or intended that Paschal speak to his wife.

On December 6, 1962, and during the trial of the "Test Fleet" case, Judge Miller, presiding at the trial, held a closed hearing, following which he removed Mrs. Paschal from the jury in that case. Paschal and King were called into the hearing. King invoked his Fifth Amendment rights at said hearing. King also invoked his Fifth Amendment rights when subpoenaed to testify before the grand jury. The government knew that King was represented by counsel at that time.

In October 1968, some nineteen months after the commencement of petitioners' incarceration, the government, in response to Hoffa, Parks and Campbell's petition for a writ of certiorari to review the Sixth Circuit's affirmance of the denial by the District Court of their post-conviction motion for new trial, revealed to this Court that it had in its possession records of an undisclosed number of conversations, participated in by two of the petitioners, which were monitored by the government during the course of electronic surveillances.[1] The government did not disclose to this Court the number of such electronically monitored conversations, the date and places where such conversations occurred, the participants therein, or the content of such conversations. The government also represented that none of the three petitioners was ever the subject of electronic surveillance directed against him.

On March 24, 1969, this Court granted said petition for writ of certiorari and remanded the case to the District Court for a hearing to determine whether the convictions were tainted by the government's electronic surveillance.

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[1] It should be noted that the petitioner King did not file a Notice of Appeal from the District Court's Order in 1967 denying defendants' motion for new trial, but instead filed a motion for reduction of sentence in May, 1967. On June 7, 1967, the District Court reduced petitioner King's sentence by ordering that he be eligible for parole at such time as the Board of Parole might determine, pursuant to Title 18, U.S.C., Section 4208 (a) (2). Petitioners Hoffa, Parks and Campbell also filed motions for reduction of sentences, but said motions were denied by the District Court.

EAVESDROP HEARING

A. Pre-Hearing Proceedings

After the remand ordered by the Supreme Court, the District Court held a pre-hearing proceeding for the purpose of determining the procedure to be followed in the eavesdrop hearing.

During said pre-hearing proceedings, government counsel advised the Court that they had no information of any type of electronic overhearing that was illegal under the Fourth Amendment involving Parks or King (A. 141; Tr. 30-31).[2] In response, the Court held that it was up to the Court to determine whether a surveillance was a violation of the Fourth Amendment and that this would be done after a proper presentation of the facts. Government counsel remained silent, thus not revealing that a conversation between King and secret government informant Partin had been electronically overheard, recorded and transcribed one day prior to the return of the indictment.

Several days later, the government represented that the defendants overheard through electronic eavesdropping were Hoffa and Campbell (A. 24-28). Such government disclosure was made in writing and stated that the conversations were eavesdropped upon through the use of microphone installations (bugs) in Las Vegas, Nevada, and by radio equipment in Detroit, Michigan.

Subsequently, Hoffa and Campbell moved for production under Rule 16, F.R.Cr.P., of all reels of conversations electronically overheard by the government of **any of the defendants and witnesses**, including but not limited to

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[2] "A" references are to the printed appendix filed in the Court of Appeals and subsequently in this Court. "Tr." references are to pages in the transcript of the proceedings at the eavesdrop hearing.

the conversations identified in government's previous disclosure. Petitioner Parks joined in this motion (A. 34-36). The government filed a written response stating *inter alia* that "no conversations of the defendant Parks have been overheard by electronic surveillance. . . ." (A. 36-37).

Subsequently, defense counsel for King filed a motion for an order allowing him to adopt all motions previously filed by Hoffa and Campbell (A. 47). The government filed a response objecting to King's motion, and asserted that King made no showing that he had been overheard or that he had standing (A. 48). Accordingly, the District Court found:

> "The Court indeed agrees that all overheard conversations of the defendants and all conversations surveilled on their premises must be revealed to the defendants. The government has disclosed certain conversations and stated that **there are none with respect to defendants King or Parks.**" (Emphasis added. A. 54-55).

The Court then held that King and Parks would be allowed to adopt all motions of Hoffa and Campbell in regard to discovery, but because of the government's representations that there were no overhearings of King and Parks, the King and Park motions were denied.

Another conference among the Court, defense counsel and government counsel was held prior to the hearing. The Court, noting that the government had represented to the Supreme Court that the Las Vegas and Detroit bugs were the only overhearings (A. 159), instructed the government to make full disclosure of all overhearings so that additional hearings in the future would not be necessary (A. 157, 161; Tr. 25, 32). In so doing the Court also noted that the government had made representations to him at trial that there were no overhearings (A. 160; Tr. 28).

B. Evidence Relating to Partin-King Conversation Adduced at Eavesdrop Hearing

Walter Sheridan, Special Assistant to the then Attorney General, Robert Kennedy, was called as a government witness at the eavesdrop hearing and testified that although he was not an attorney, he was in charge of the overall investigation concerning the instant case (A. 172; Tr. 8). Sheridan testified on direct examination that he had never requested any federal agency to conduct any illegal eavesdropping on any defendant in this case, and that he had never asked **"any federal employee to eavesdrop on any defendant in this case"** (A. 172; Tr. 8).

On cross-examination, Sheridan at first refused to admit that there was any eavesdropping:

> "Q. How did you know that it was not illegal?
> A. That **what** was not?
> Q. Did you take it up with somebody?
> A. That **what** was not illegal?
> Q. Any of the eavesdropping that was done?
> A. **I'm not saying there was any done, Mr. Shenker.**" (Emphasis added. A. 181; Tr. 22-23.)

On further cross-examination, Sheridan finally confessed that F.B.I. agents had placed a recording device and hidden microphones in Partin's automobile and that a conversation between King and Partin was electronically overheard, recorded and transcribed shortly before the return of the instant indictment[3] (A. 182-183; Tr. 24-26). Sheridan testified that the overheard conversation took about 20 to 30 minutes (A. 223; Tr. 89), that he read the transcript of the recorded conversation within 48 to

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[3] Although government witnesses testified that the Partin-King overhearing took place ten days to two weeks prior to the return of the indictment, the trial court's *in camera* examination of government files revealed that it took place on May 8, 1963, on day prior to the return of the indictment.

72 hours after it took place and that he conferred with government trial prosecutor James F. Neal concerning the transcribed conversation (A. 184, 1954; Tr. 27-29). Sheridan also admitted that he discussed the conversation in detail with Partin sometime after the time of the conversation (A. 186; Tr. 31), however, the defense was not permitted to ask Sheridan if he was satisfied with the information (Tr. 88; A. 222).

The transcript of the recorded conversation was placed in the Department of Justice's file on the Hoffa investigation and was kept under Sheridan's control with everything in it being available to government prosecutor Neal (A. 223; Tr. 89-90). **Sheridan admitted that the transcript of the eavesdrop conversation had not been turned over to the trial court at the original trial** (A. 185; Tr. 30). A copy of the transcript of this conversation was made a part of the Sixth Circuit's majority opinion (App. A., *infra*, pp. 8-16).

Herbert J. Miller, Jr., Assistant Attorney General in charge of the Criminal Division of the Department of Justice from 1961 to April, 1965, admitted that he knew that the electronic eavesdropping was planned and that he probably authorized it, saying "Go ahead and do it" (A. 247, 279; Tr. 126, 177). Miller testified that the idea of the electronic bugging originated with the Department of Justice and that he was responsible for it (A. 260, 279; Tr. 148, 178, 189).

James F. Neal, trial counsel in both the Test Fleet case and in the instant case, testified that although he had not talked to Partin, it was his "understanding" that the electronic device was placed in Partin's automobile with Partin's knowledge (A. 292; Tr. 196-197). The defense objected to Neal's statement about what he "understood", and the Court ruled that if Neal was merely testifying as to what he had been told it would not be competent

evidence.[4] Neal then admitted that he did not remember talking to Partin himself (A. 292; Tr. 197).

Neal testified that he knew ahead of time that the electronic eavesdropping devices were going to be used to record the conversation between Partin and King and thought that he had requested that the F.B.I. place the devices in the automobile (A. 292-293; Tr. 197-198). Neal admitted that he did not seek a Court order authorizing the installation of the recording equipment, although the Court was available (A. 338-339; Tr. 271-273). **He admitted that Partin's car was bugged for the purpose of interviewing petitioner King** and that King was one of the people the government was "certainly . . . considering indicting" prior to the time of the "bugged" interview (A. 308, 338-339; Tr. 222, 271-273).

Neal read the transcription of the conversation, but did not turn it over to the Court at trial. **Neal said he did not turn it over under the Jencks Act, and would not do so today** (A. 295-300; Tr. 201-210). Although Neal contended that no evidence had been used from the Partin-King conversation and that the government had not secured any evidence from any information learned from the conversation, he was not certain of the exact stage of the investigation when government witnesses Pitts and Paschal had changed their testimony from exonerating King of any wrong-doing to incriminating King of the crime charged in the indictment[5] (A. 330). Neal acknowl-

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[4] Prior to Neal's testimony, the defense advised the trial court that the government had not proved that Partin **consented** to the placement of the recording device in his automobile (A. 233; Tr. 105). The defense again reminded the Court and the government of this fact near the end of the hearing (A. 557; Tr. 1452).

[5] Government witnesses Pitts and Paschal gave earlier statements to the government that King had **not** made any attempt through Paschal to influence Paschal's wife, who was serving on the jury in the Test Fleet case. At trial, Pitts and Paschal

edged that government witnesses Pitts and Paschal might not have changed their stories so as to implicate King until **after** the return of the instant indictment (A. 330; Tr. 259), and that the only thing the government did **not** have in the grand jury was the testimony of Mr. Pitts and Mr. Paschal and that the government got that "later on" (A. 331; Tr. 261).

After government witnesses Neal, Miller and Sheridan testified at the eavesdrop hearing, the Court asked the government what information the Court had that the Partin-King overhearings were "consenual" other than the government's representation. Government counsel stated that he thought the testimony had been clear that Partin consented. Defense counsel disagreed and asked the Court to order the production of Partin as a witness, and requested that he be a witness of the Court or a witness of the government in order that the defense could question him pertaining to the consent issue. The Court denied the motion, stating that it was up to the government and to the defense to produce their own witnesses (A. 419-420; Tr. 398-399). **The government did not subpoena Partin and presented no evidence on the consent issue.**

The recording equipment was installed in and removed from Partin's automobile by two FBI agents who never saw or spoke to Partin (A. 535-540).

The conversation between Partin and King is reproduced as an appendix to the Court of Appeals opinion (App. A, *infra*, at pp. 8-16). During the conversation Partin sought and obtained from King his version of the

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changed their earlier testimony and testified as government witnesses (A. 330). Pitts testified at trial that Sheridan prior to Pitts' testimony before the grand jury in January 1963, threatened to get him and his wife indicted if "you don't tell me the truth" (A. 691; 1057a-58a). On May 14, 1963, Pitts gave a sworn statement exonerating King (A. 703-706; 1074a).

Pitts incident (i. e., the incident upon which conviction was fashioned) (Ex. 12, App. 131, 135), his fears of what Pitts testimony might be (id. 132), his fears as to whether "that highway patrolman will stay put" (id. 132), what the testimony of that "little fellow" would be (id. 133), the testimony Broda, another potential witness might give (id. 134), his inability to remember Tweel (id. 132, 135), and what he knew about phone calls made by a co-defendant (id. 137).

F.B.I. Agent William L. Sheets was liaison man between the Justice Department and the F.B.I. in the Hoffa prosecution (A. 595; Tr. 1526-1527). After he listened to the tape for days, nights and weeks (A. 602; Tr. 1539), he caused the **original** tape to be destroyed in April, 1966 (A. 603; Tr. 1539-40), although he knew King's case was then on appeal. **Sheets had no recollection of whether Partin consented to have the recording device in the automobile** (A. 629; Tr. 1582).

C. Trial Court's findings

The trial Court filed a written opinion (App. B, *infra*, pp. 18-40) overruling all pending motions and affirming the convictions and sentences heretofore imposed upon each petitioner. Judge Wilson acknowledged that the government had not disclosed to this Court that it had in its possession the recordings of the conversation between King and Partin; but noted that King did not appeal from the decision of the trial Court overruling the post-trial Motion for New Trial and accordingly was not before the Supreme Court at the time of the remand on that motion. Since the time for filing motions for new trial had elapsed the Court limited King's participation in the evidentiary hearing to rights of a constitutional or jurisdictional nature, i. e., those which could be raised by way of a petition for habeas corpus or pursuant to 28 U.S.C. 2255.

Substantively, the trial Court held that informant Partin consented to have the tape recorders installed in his automobile and although acknowledging that the overheard conversation did relate to the instant case, no taint resulted because 1) the recording was neither incriminatory nor exculpatory, and 2) the government, prior to the eavesdropping, had available to it, all of the evidence used by it at trial, including the testimony of government witnesses Oscar Pitts and Highway Patrolman Paschal (A. 122)

The Court recognized that under the teachings of **Massiah v. United States**, 377 U.S. 201, **King's Fifth Amendment rights** to refrain from giving evidence against himself **may have been violated**, but concluded that such conduct did not taint any of the evidence actually used at trial.

The Court held that the government's failure to disclose the Partin-King recording and transcript at the time of trial was not a violation of Title 18 U.S.C., § 3500 (Jencks Act) for the reason that the petitioners did not have standing to assert the matter since the time for filing a motion for new trial had expired, that petitioners' contention was merely statutory, and could not be raised in a motion filed under Title 28, U.S.C., Section 2255. The Court concluded that the recording and transcript were not Jencks' statements and even if they were, the government's failure to disclose was harmless error.

D. **Opinion of Court of Appeals**

The District Court's ruling was affirmed by the Court of Appeals in an opinion written by Brooks, J. (Peck, J., concurring, McCree, J., concurring in part and dissenting in part). The Court held that the electronic surveillances were legal, concluding that King's Fourth Amendment right to be free of illegal searches and seizures was not

violated for the reason that government informant Partin **consented** to the eavesdropping. Secondly, the Court concluded that King's Fifth and Sixth Amendment rights were not violated for the reason that he was neither interrogated while in custody, nor was there any compelling pressure applied which forced him to incriminate himself. Additionally, the Court held that this Court's decision in **Massiah v. United States**, 377 U.S. 201, was inapplicable for the reason that the surveillance took place one day prior to the return of the indictment (App. A, *infra*, p. 6).

Finally the Court held that 1) the government's suppression of the recordings and transcriptions of the conversation at the original trial did not constitute suppression of evidence requiring reversal, as contemplated by this Court in **Giles v. Maryland**, 386 U.S. 66, and **Brady v. Maryland**, 373 U.S. 83, since the conversations were neither of an incriminating nor exculpatory character; and 2) that the recording was not a statement that should have been produced under 18 U.S.C. § 3500 since it was not made **to an agent** of the government.[6]

REASONS FOR GRANTING THE WRIT

1. Violation of Fifth and Sixth Amendments.

The Court of Appeals relied upon **Hoffa v. United States**, 385 U.S. 293, in holding that the government's use of its secret informant and electronic surveillance was not in

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[6] Judge McCree would have remanded for hearing to determine whether reversal was required by the principles announced in **Napue v. Illinois**, 360 U.S. 264 (1959), for the reason that disclosure of the King-Partin transcription "raises a serious question whether the government knowingly used perjured testimony in the original trial" (App. A, *infra*, p. A-16). The majority however disagreed, saying: "Appropriate procedures which are to be originated in the District Court are available in appellate review of these matters are sought . . ." (App. A, *infra*, p. A-3).

violation of the Fifth and Sixth Amendments. The Court reasoned that this Court's holding in **Massiah v. United States**, 377 U.S. 201, does not apply here since the secret interview of King took place one day **preceding** the return of the indictment, instead of **after** King was indicted. We submit that this Court should grant certiorari here and review the legal effects of this Court's decision in **Hoffa** upon the prior holdings of this Court in **Massiah** and **Spano v. New York**, 360 U.S. 315.

Admittedly, government informant Partin, acting in concert with federal officers, after (1) the alleged crime had already been committed and reported to the government by said informant, (2) King had twice expressly asserted his constitutional privilege against self-incrimination, and (3) the government had knowledge that he was represented by counsel, surreptitiously obtained vital defense information and adduced incriminating admissions from King at the direction of the government. This was done without advising King of his rights under the Fifth and Sixth Amendments to the United States Constitution. Such conduct constituted a violation of King's rights under the Fifth and Sixth Amendments, which protect him, among other things, from being compelled to be a witness against himself, and provide that he has the right to have the assistance of counsel. **Massiah v. United States**, 377 U.S. 201; **Spano v. New York**, 360 U.S. 315.

The Court of Appeal's reliance upon **Hoffa** is misplaced for in **Hoffa**, the claimed admissions were obtained **at the same time** the alleged offense was taking place. Here, the statements were obtained long **after** the time of the alleged offense and **after** full investigation by the grand jury. All that was left to be done at the time of the surreptitious interview was the formal act of reporting out the return of the indictment in open Court, which occurred the very next day. Thus **Hoffa** does not apply here,

but **Massiah** and **Spano** do apply for the reasons that King had expressly asserted his constitutional privilege against self-incrimination, was represented by counsel and therefore was a virtual defendant at the time the government intentionally interviewed him and obtained vital defense information and admissions. **United States v. Luxenberg**, 6 Cir., 574 F.2d 241; **United States v. Stanley**, 6 Cir., 245 F.2d 427; **People v. Stendig**, 6 N.Y.S.2d 214, 216; **People v. Wallace**, 234 N.Y.S.2d 579.

The interview of King was a success, rather than failure, for the interview was not merely investigative, as investigation by the grand jury was complete. The main purpose of the interview was to obtain for the prosecution, not only evidence, but rather insight and information as to the likely defense positions in the forthcoming trial.

The purpose was well served. King not only told prosecutor Neal (**via** the recording) his version of the Pitts incident, (i.e. the incident upon which conviction was fashioned) but his fears of what Pitt's testimony might be, his fears as to whether "that highway patrolman will stay put", what the testimony of that "little fellow" would be, what the testimony of other potential witnesses might be, his inability to remember Tweel, (Tweel was a codefendant who was acquitted at the trial of this case) and what he knew about phone calls made by a codefendant.

The underlying vice complained of here, i.e. permitting the government to secretly interrogate a virtual defendant after he has already availed himself of his Fifth Amendment rights, lies in the intrusion into the defense camp so that the prosecution knows and can anticipate likely defense evidence, position and strategy. It was this type of trespass which was struck down in **Caldwell v. United States**, D.C. Cir., 205 F. 2d 879; **Coplon v. United States**, D.C. Cir., 191 F. 2d 749, and in **Massiah**. Such intrusion

makes fair trial impossible.[7] Had this evidence been known to the petitioners and their counsel at trial, a different view might have been taken for the reason that they would have had knowledge that the defense was already known to the prosecutor.

2. **Violation of Fourth Amendment.**

As of the time of the preparation of this petition, this Court had not rendered its decision in **United States v. White**, No. 13, Oct. Term, 1970[8], which was first argued in this Court in November, 1969 and re-argued in October, 1970. We submit that this Court should grant certiorari here for the reason that not only are the same constitutional questions involved in both **White** and this case, but here, the reasons for granting certiorari are more compelling. Moreover, if this Court should decide **White** prior to deciding whether to grant certiorari on the instant Fourth Amendment issues, then we urge this Court to apply the teachings of **White** in making said decision.

The law has been clear for many years that the government has the burden of proving that its warrantless

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[7] The government's intentional misconduct constituted federal constitutional error which affected petitioners' substantial rights, and therefore the petitioners need not show prejudice for reversal. Additionally, since the error committed was of constitutional proportions and the record does not negative, but affirmatively shows a reasonable possibility of prejudice to petitioners, the convictions must be reversed. **Chapman v. California**, 386 U.S. 18; **Shields v. United States**, 273 U.S. 583; **United States v. Schor**, 2 Cir., 418 F. 2d 26; and **Evans v. United States**, 6 Cir., 284 F. 2d 393.

[8] **United States v. White**, 7 Cir., 405 F. 2d 838, cert. gr. 394 U.S. 957. In **White**, the Court of Appeals sitting *en banc* held that defendant's Fourth Amendment rights were violated when government agents electronically overheard conversations between defendant and an informant with the consent of the informant. Clearly, the Seventh Circuit's decision in **White** is in direct conflict with the decision by the Sixth Circuit in the instant case.

searches outside judicial process and without prior judicial approval were conducted under such exceptional circumstances that it can validly claim an exemption from the general rule that requires the obtaining of prior judicial approval. **Wong Sun v. United States**, 371 U.S. 471; **United States v. Jeffers**, 342 U.S. 48, 51; **Chimel v. California**, 395 U.S. 752; **United States v. Rivera**, 2 Cir., 321 F. 2d 704. Here, not only does the record fail to show exceptional circumstances why the government intentionally failed to obtain prior judicial approval, but government trial counsel (Neal) admitted that a federal judge was available to the government for the obtaining of a warrant at the time of the electronic bugging (A. 339, Tr. 271-273). Thus, the government has never attempted to establish "exceptional circumstances."

The constitutional violations here are far more serious than those in **White**. In **White**, the bugging took place at the time of the alleged crime (sale of narcotics), but here, the alleged crime had been committed months previously and King was a virtual defendant at the time of the interview. Clearly, there were no overriding reasons for eliminating the necessity of obtaining prior judicial approval here. The government patently chose not to take the risk of asking the Court to approve the surrepititious interview for fear the request would be rejected. Cf. **Osborn v. United States**, 385 U.S. 323.

The District Court and the Court of Appeals held that the eavesdropping did not violate the Fourth Amendment because Partin **consented** to have the "bugs" installed in the car. As we have shown in our "Statement", *supra*, the record does not confirm that Partin gave his consent. Contrariwise, the record affirmatively establishes the definite possibility that Partin did not know that his conversation with King was being recorded.

For instance, Partin testified at trial that he never agreed to be an informer, never tried to trap anyone and

was never given any listening device by the government. If this testimony was true, then it would **not** be consistent with the government's claim here that Partin gave his consent.

Although it was not petitioners' burden to show that consent was **not** given,[9] defense counsel called to the trial Court's attention the insufficiency in the government's proof and even suggested that Partin be called as a witness. The trial Court denied the request and government counsel failed to subpoena Partin. In sum, the record does not contain any competent evidence that Partin gave his consent.

Once it is recognized that the government electronic eavesdropping was not consensual, then under this Court's holding in **Silverman v. United States**, 365 U.S. 505, the convictions must be reversed. Further, assuming *arguendo* that Partin did give his consent, then this Court should grant review for the previously stated reasons.[10]

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[9] **Bumper v. North Carolina**, 391 U.S. 543; **Wren v. United States**, 10 Cir., 352 F. 2d 617; **Simmons v. Bomar**, 6 Cir., 349 F. 2d 365; **Judd v. United States**, D.C. Cir., 190 F. 2d 649; **Kovach v. United States**, 6 Cir., 53 F. 2d 639.

[10] Assuming that the conviction of King was violative of his constitutional rights and as a consequence must be set aside, so must the conviction of Hoffa for the following reason: Hoffa and King were charged and convicted under Count V of the indictment of endeavoring to influence juror Mrs. Paschal. King was charged as a principal, and Hoffa was charged under Title 18, U.S.C., Section 2, with aiding and abetting King in the commission of said offense. Under these circumstances, the validity of Hoffa's conviction on said count is dependent on the validity of King's conviction. Hoffa could not have been convicted of a crime under this count unless King was properly convicted.

The majority of the Court of Appeals did not decide this question, however, they did indicate that Hoffa had more of a concrete right than the remaining petitioners (App. A, *infra*, p. 5). Further, the Sixth Circuit in **Kinser v. Cooper**, 6 Cir., 413 F. 2d 730 (1969), held that where the conviction of an aider and abettor was constitutionally infirm and could not

3. Government's suppression at trial of King-Partin transcript violated petitioners' right of due process and 18 U.S.C., Section 3500.

The District Court, among other things, held that no petitioner could urge failure of the government to produce the Partin-King transcript at trial, inasmuch as the issue had never been raised before and its suppression by the government was neither a jurisdictional nor constitutional error reversible in a post-conviction proceeding (App. B, *infra*, p. 38). We submit that it is a violation of due process to hold that petitioners were not timely in their objection to the government's failure to produce the Partin-King transcription, where efforts to obtain same were actively thwarted by the government's intentional suppression of its existence. Here, the petitioners at trial actively and vehemently demanded not only all Jenck's statements, but all electronically recorded conversations of their voices. Thus, it is clear that petitioners did not knowingly waive anything. We submit that to permit the government to remain silent as to the existence of this tape recording through the appeals and to this Court, and then to hold that the defense is out of time to raise a newly confessed governmental error is violative of Due Process and the spirit of fair play inherent in American jurisprudence.

When the defense at trial made its demand for Partin's Jenck's statements, the government, unilaterally and in an *ex parte* manner, determined, without any judicial supervision, that the transcript of the Partin-King conversation did not constitute a "statement" within the

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be permitted to stand, the conviction of the principal must also fall. *A fortiori* where, as we have shown, the conviction of the alleged principal (King) was violative of his constitutional rights and as a consequence must be set aside, so should the conviction of Hoffa also be set aside.

meaning of 18 U.S.C., § 3500. Such action was, as stated in **Palermo v. United States**, 360 U.S. 343, 354 (1959) "destructive of the statutory purpose" of 18 U.S.C., § 3500. See also **Rosenberg v. United States**, 360 U.S. 367. The Court of Appeals did not consider this issue, but merely held that the recorded conversation between King and Partin was not a statement that should have been produced under 18 U.S.C., § 3500. The Court concluded that the recorded conversations were not statements made to an agent of the government.

Thus, the Court's holding is contrary to the holding of this Court in **Palermo.** For, the decision condones the government's unilateral and *ex parte* determination of whether or not to produce documents which, at the minimum, were questionable Jenck's Act statements. Such a holding destroys the statutory purpose of the Jenck's Act.

The Court of Appeals relies upon the Seventh Circuit's decision in **United States v. Soffer,** 7 Cir., 362 F. 2d 523 to support its holding that the recordings are not Jenck's statements. **Soffer** held that the tape recording of a conversation of a bribe effort need not be produced after the bribee testifies during trial about the extortion itself, since the tape recording was a contemporaneous transcription of the crime itself and "not a recital of a past occurrence by a prospective witness and is not within the general purview of Section 3500." 362 F. 2d at 525. Here, the recording was made at the direction of agents of the government and intended to be delivered to them. It was made on their equipment, installed by their agents, and transcribed and retained for use and review of government agents. The transcript of the conversation constituted a statement under the Jenck's Act as surely as if Partin had given the details of the events to Sheridan who in turn wrote them down. Also, the recording was

not a contemporaneous transcription of the crime itself as it was in **Soffer.**

Indeed, the Partin-King conversation intrinsically impeaches Partin's trial testimony. A simple reading of the transcription shows that Partin was seeking inculpatory statements from King. Since King made no incriminatory statements in the bugged interview, something highly unlikely if he had already admitted his guilt to Partin, the trial jury likely would have concluded that Partin was lying when he testified that King had previously told him he was guilty. At the least, the transcription would have been a tremendously important piece of evidence to be used ". . . before the jury by way of cross-examination and impeachment . . ." **Harris v. New York,** . . . U. S. . . ., No. 206, October Term, 1970; **Brady v. Maryland,** 373 U.S. 83; **Giles v. Maryland,** 386 U.S. 66.

This Court should review the Court of Appeals' interpretation of the Jenck's Act and decide whether or not such a transaction does fall within the purview of the statute. Further, the Court should review the lower Court's holding that condones the government's unilateral and *ex parte* determination, which if permitted in the future, will surely destroy the statutory purpose of 18 U.S.C., §3500.

CONCLUSION

For the reasons stated herein, we respectfully submit that the petition should be granted.

Respectfully submitted

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